

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

January 14, 2005

IN RE:

**PETITION OF KMC TELECOM III, LLC, KMC TELECOM V,
INC. AND KMC DATA LLC FOR ARBITRATION OF AN
INTERCONNECTION AGREEMENT
WITH UNITED TELEPHONE-SOUTHEAST, INC.**

)
)
)
)
)
)

**DOCKET NO.
04-00136**

**ORDER GRANTING IN PART AND DENYING IN PART
JOINT MOTION TO HOLD PROCEEDING IN ABEYANCE**

This matter is before the Pre-Arbitration Officer pursuant to the *Joint Motion of KMC Telecom III LLC, KMC Telecom V, Inc., KMC Data LLC and United Telephone-Southeast, Inc. to Hold Proceeding in Abeyance* (“*Joint Motion*”) filed by United Telephone-Southeast, Inc. (“Sprint”) and KMC Telecom III, LLC, KMC Telecom V, Inc., KMC Data, LLC (“KMC”) on December 8, 2004. In the *Joint Motion*, Sprint and KMC (collectively, “the Parties”) request that the proceedings in this docket be held in abeyance until January 24, 2005.¹ Contingent upon the grant of the *Joint Motion*, the Parties agree to waive the nine-month deadline required by 47 U.S.C. § 252(b)(4)(C) for final resolution of the arbitration by the Authority. At the conclusion of the abeyance period, the Parties propose that KMC will file a supplement to its petition for arbitration and a revised issues matrix to identify all remaining issues in need of resolution by the Authority and that Sprint would then file a supplemental response and a revised issues matrix.

As support for the *Joint Motion*, the Parties state that, prior to the filing of the petition for

¹ The parties also requested that the status conference set for December 14, 2004 be cancelled. A Notice of Cancellation was issued on December 9, 2004. Because that request was previously granted, it will not be addressed in this order.

arbitration, the Parties were negotiating the appropriate terms and conditions for the Master Interconnection and Resale Agreement ("Agreement") based on the law effective during negotiations. On March 2, 2004, the United States Court of Appeals for the District of Columbia in *United States Telecom Ass'n v FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") affirmed in part, and vacated and remanded in part, certain rules of the Federal Communications Commission ("FCC"). The court's mandate was issued on June 15, 2004. The FCC voted to adopt interim rules, which the Parties understood would be followed by permanent rules within six months. On August 20, 2004, the FCC released an interim order² and indicated its intent to issue new unbundling rules prior to the end of 2004. In consideration of these circumstances, the Parties request that these proceedings be held in abeyance to address the effect of the *USTA II* decision, the FCC's interim order and the forthcoming unbundling rules on the terms, conditions and rates that should be included in the Agreement, as well as to identify any additional issues for resolution in this arbitration. The Parties agree that no new issues may be raised in the arbitration proceeding, other than those issues that result from their negotiations regarding the above referenced rules and orders. The Parties contend that the abeyance will promote administrative efficiency by avoiding separate negotiation and arbitration of interconnection agreement terms to reflect the *USTA II* decision, the FCC's interim rules and the new unbundling rules. The Parties have also agreed to continue to operate under their current interconnection agreement until a new agreement resulting from the proceeding is executed. They also state they will continue their efforts to close the remaining issues already included in the arbitration. Finally, although the Parties request an abeyance of the docket until January 24, 2005, they state that they may request a further abeyance of the proceedings.

² See *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 04-179 (Order and Notice of Proposed Rulemaking) (August 20, 2004)

FINDINGS AND CONCLUSIONS

The Pre-Arbitration Officer agrees that the FCC's new rules may impact some of the issues submitted for arbitration and that the Parties should be given an opportunity to assess how the new rules may change the parties' respective positions on those issues. To provide such an opportunity, the Pre-Arbitration Officer finds that the Parties' request to hold this matter in abeyance until January 24, 2005 is well-taken and should be granted. The Pre-Arbitration Officer does not agree, however, that as a result of such an assessment the Parties should be allowed to raise any new issues or amend or supplement the petition or the response to raise new issues. The petition for arbitration was filed by KMC on May 6, 2004 and the response was filed by Sprint on June 1, 2004. The arbitration panel accepted the petition for arbitration on September 13, 2004.³ Pursuant to 47 U.S.C. § 252(b)(4)(A),⁴ the Authority must limit its consideration to those issues for arbitration set forth in the petition or response.⁵ Because the arbitration must be limited to those issues set forth in the petition for arbitration and in the response, the Pre-Arbitration Officer finds that the Parties may change or supplement their positions for the purpose of addressing the new FCC rules only as they relate to the issues previously raised in the petition or response. Therefore, the Parties' request to supplement the petition and response to add issues regarding rules and orders occurring after the filing of the arbitration petition is denied. However, this decision should not be interpreted as precluding

³ See *Order Accepting Arbitration and Appointing Pre-Arbitration Officer* (October 6, 2004)

⁴ 47 U.S.C. § 252(b)(4)(A) reads

(4) ACTION BY STATE COMMISSION –

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3)

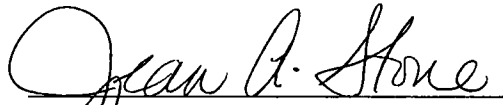
⁵ The FCC's interpretation of the statute also supports the conclusion that the Authority is limited to consideration of those issues for arbitration raised initially. "In our view, it would be inconsistent with the Act's grant of authority to the state commissions to arbitrate disputes if we interpreted the statute to authorize us to preempt the state commissions for 'failing' to arbitrate disputes that were not clearly and specifically presented to the state commission **in the first instance** for arbitration" (emphasis added). *In the Matter of Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, FCC 97-345 (Memorandum Opinion and Order), 12 F.C.C.R. 15,594, ¶ 27 (September 26, 1997)

either party from filing a new, separate petition for arbitration with the Authority pursuant to federal law to address any new open issues that may arise during the course of their negotiations.

Because the Parties indicate negotiations concerning the issues in this docket have been on-going, the Parties are directed to file a Joint Issues Matrix indicating which items, if any, have been settled and any change or supplement to their respective positions on the existing issues. The Joint Issues Matrix shall be filed with the Authority **no later than 2:00 p.m. on January 25, 2005.**

IT IS THEREFORE ORDERED THAT:

1. The proceedings in this matter are held in abeyance until January 24, 2005;
2. The Parties are directed to file with the Authority a Joint Issues Matrix consistent with the terms of this order **no later than 2:00 p.m. on January 25, 2005;** and
3. Each party is directed to file a statement regarding whether it will agree to waive the nine-month deadline for resolution of the arbitration set forth in 47 U.S.C. § 252(b)(4)(C) in light of the partial granting of the *Joint Motion*. Each statement must be filed with the Authority **no later than 2:00 p.m. on January 25, 2005.**


Jean A. Stone, Counsel
as Pre-Arbitration Officer